80-2203

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD Y. PIERCE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether jurors' concealment on *voir dire* of religious or racial prejudice against a defendant's attorney violates the right to a fair trial guaranteed by the Fifth and Sixth Amendments to the Constitution.

2. Whether Rule 606(b) of the Federal Rules of Evidence precludes consideration of juror testimony concerning jury deliberations for the purpose of proving concealment of religious or racial prejudice on *voir dire.*

3. Whether juror testimony of religious or racial prejudice advanced by a juror during deliberations is within the exception in Rule 606(b) of the Federal Rules of Evidence allowing testimony concerning "extraneous prejudicial information" for purposes of impeaching the verdict.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, appears in the appendix at pp. 1a-3a. The opinion of the court of appeals denying rehearing or rehearing *en banc* appears in the appendix at p. 4a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1981. A timely petition for rehearing, or rehearing *en banc* was denied on April 30, 1981, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF EVIDENCE INVOLVED

The Fifth and Sixth Amendments to the United States Constitution are set forth in the appendix at pages 33a and 34a, respectively. Rule 606(b) of the Federal Rules of Evidence is set forth in the appendix at page 35a.

STATEMENT OF THE CASE

Several days after a federal jury, which had initially reported that it was deadlocked, returned a verdict of guilty, a juror contacted the district judge. The juror told the judge that she was disturbed about the verdict and the jury deliberations. The judge then wrote counsel, reporting (App. 5a-6a):[1]

> [T]he juror stated, in substance, that she had grave doubts about the guilt of the defendant, and that members of the jury stated to her that she should not believe the arguments made by counsel for the defendant in light of the fact that he was of Jewish origin.

The judge scheduled a meeting in chambers with the juror and counsel "to explore the questions raised by these statements." (App. 6a) The meeting was set for the same day on which petitioner's motion for a new trial and sentencing were scheduled. At the meeting, during which the juror testified, the judge indicated he would deny petitioner's motion for a new trial. (App. 32a)

The Trial

Petitioner was indicted for seven counts of possession and distribution of cocaine and seven counts of using a

[1] References preceded by "App." are to the appendix to this petition. References preceded by "R." are to the joint appendix filed in the court of appeals.

communication facility to facilitate the commission of a felony, in violation of 21 U.S.C. §§ 843(b), 841(a)(1), and 845. (R. 7-12) Jurisdiction in the trial court was based on 18 U.S.C. § 3231. Trial began on January 7, 1980. The jury began its deliberations on the afternoon of Friday, January 11. After a weekend recess, deliberations were resumed the following Monday morning. After several hours of additional deliberations, the jury sent a note to the district judge, stating that it was unable to reach a verdict. (R. 361) The judge gave a modified *Allen* charge (R. 362-65), and deliberations continued until late Monday afternoon, when a guilty verdict was returned as to each of 12 remaining counts. The jury was polled, and each member affirmed the verdict. (R. 366-68) On January 29, 1980, the judge sentenced petitioner to a total of 15 years in prison and, on March 6, 1980, entered an order formally denying petitioner's motion for a new trial.

The *Voir Dire*

The judge conducted the *voir dire*. He explained at the outset that the purpose of his questions was to ensure "a fair and impartial trial," and urged the prospective jurors not to hesitate to respond affirmatively to any question. (R. 391)

After introducing defense counsel, the judge asked whether "any of you know any reason why you cannot decide this case fairly on the evidence that you will hear from the witness stand and on the instructions that are given to you by the Court, is there any reason why you—or any of you are entering into this case with any preconceived bias, prejudice, or any feeling about how the case should be decided because these parties are entitled to a fair and impartial jury that has no preconceptions whatever about how this case should be decided?" (R. 393) No member of the panel responded.

The judge later pointed out that petitioner and his attorney "are from Miami, Florida" and asked: "[a]re there any of you who would feel any prejudice or bias against Mr. Pierce or his attorney because they are from out of state, Florida?" (R. 394) No member of the panel responded.

Finally, the judge asked: "[i]s there any reason that the jurors who are now taking their places in the jury box know why they cannot fairly and impartially decide this case as between the United States and Mr. Pierce?" (R. 395) Again, no member of the panel responded.

The Testimony Of The Juror

The juror who contacted the district judge, Judith Hendrix, testified at the hearing in chambers that the jury foreman had made disparaging remarks about the religion of petitioner's attorney, Jack Blumenfeld, who is Jewish. Ms. Hendrix testified that during deliberations after the district judge had given a modified *Allen* charge, she said she found petitioner's story "believable." (App. 20a) The jury foreman responded that "you know, the attorney, the defense attorney is Jewish; therefore, you know, how they are. They can convince anybody of anything . . . ." (App. 20a-21a) Other jurors expressed agreement with this remark. (App. 21a) When juror Hendrix praised the closing argument of defense counsel, the foreman stated, in substance, that she "couldn't put much stock in that because of [his] racial origin." (App. 12a) Ultimately, Ms. Hendrix agreed to a guilty verdict even though she "found [herself] . . . in pretty much disagreement with just about everything that was said." (App. 24a-25a) All of the facts regarding the statements as to Mr. Blumenfeld's religion, Ms. Hendrix' "grave doubts" about the verdict, and other aspects of the jury deliberations, disclosed in her testimony, are undisputed.

The Decision Of The Court Below

In his motion for a new trial, and in his subsequent appeal, petitioner asserted, among other arguments, that the trial court erred in refusing to grant a new trial because the jury foreman failed to disclose at *voir dire* the existence of prejudice against petitioner's counsel based on his religion, and because religious prejudice had affected the verdict. In stating that he would deny the motion for a new trial, the judge indicated the case should "go on to the Sixth Circuit" since he believed the issue "should be fully ironed out by them." (App. 29a) The court of appeals affirmed in a brief opinion, dismissing petitioner's arguments with the simple statement that, "[i]t was not shown that 'extraneous prejudicial information' within the meaning of Rule 606(b), Fed. Rules of Evidence, was brought to the attention of the jury." (App. 2a)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision Of Another Court Of Appeals That Concealment Of Material Bias By A Member Of The Jury Denies A Fair Trial

Petitioner argued in the court of appeals that concealment by the jury foreman (and possibly other jurors) of their religious prejudice at *voir dire* entitled petitioner to a new trial. The court rejected that argument without explicitly addressing it.

The lower court's decision conflicts with the recent decision of the Court of Appeals for the Fourth Circuit in *United States v. Bynum*, 634 F.2d 768 (4th Cir. 1980). The decision is also inconsistent with opinions of courts of appeals in other circuits which have recognized that a material concealment or misstatement by a juror on *voir dire* requires a new trial. *See Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964); *Ryan v.*

United States, 191 F.2d 779 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 928 (1952); *cf. Johnson v. Hill*, 274 F.2d 110 (8th Cir. 1960).[2]

In *Bynum*, the foreman had remained silent when the prospective jurors were asked on *voir dire* whether they had any relatives who had been criminal defendants. It was later revealed that several of the foreman's family members had been criminal defendants, but that the foreman had concealed this information for reasons of shame and embarrassment. The Fourth Circuit ruled that the concealment had impaired defendant's right "to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial. Hence, the convictions . . . must be reversed, and remanded for a new trial." 534 F.2d at 771 (footnote and citations omitted).

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[2] A wide variety of federal and state cases, in both the criminal and civil contexts, have recognized that "the fact that a juror answered falsely as to his qualifications is a recognized ground for a new trial." 1 Hayne, *New Trial And Appeal*, § 45 at 226 (1912); *see, e.g., Tobias v. Smith*, 468 F. Supp. 1287 (W.D.N.Y. 1979); *Connell v. International Paper Co.*, 97 F. Supp. 440 (W.D. La. 1951); *Hyman v. Eames*, 41 F. 676 (C.C.D. Colo. 1890); *Weathers v. Kaiser Foundation Hospitals*, 95 Cal. Rptr. 516, 485 P.2d 1132 (Cal. 1971); *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379 (Fla. Dist. Ct. App. 1972); *West Chicago St. R.R. Co. v. Huhnke*, 82 Ill. App. 404 (1899); *Pearcy v. Michigan Mut. Life Ins. Co.*, 111 Ind. 59, 12 N.E. 98 (1887); *Johnson v. Commonwealth*, 311 Ky. 182, 223 S.W.2d 741 (1949); *Shulinsky v. Boston & M.R.R.*, 83 N.H. 86, 139 A. 189 (1927); *People v. Leonti*, 262 N.Y. 256, 186 N.E. 643 (1933); *Jones v. Imperial Garages*, 174 Or. 49, 145 P.2d 469 (1944); *Texas Employers' Ins. Ass'n v. Wade*, 197 S.W.2d 203 (Tex. Civ. App. 1946). Courts have recognized, and petitioner does not dispute, that a minor, innocent nondisclosure does not require a new trial. *Compare United States v. Moss*, 591 F.2d 428, 438 (8th Cir. 1979), *sentence vacated and remanded*, 614 F.2d 171, *aff'd*, 631 F.2d 105 (1980) *with Marshall v. United States*, 355 F.2d 999, 1009-10 (9th Cir.), *cert. denied*, 385 U.S. 815 (1966) *and DeRosier v. United States*, 407 F.2d 959, 963 (8th Cir. 1969).

In the instant case, the jury foreman, at a crucial point in deadlocked deliberations, revealed his belief that petitioner's counsel could not be trusted because he is Jewish and asserted—with other jurors indicating their agreement—that counsel's arguments on behalf of his client should therefore be discounted. (R. 28, 371, 389) The foreman concealed his bigotry during *voir dire* questioning which sought to elicit the existence of any bias or prejudice. (R. 381, 393-95) If the foreman believed that arguments of Jewish lawyers were inherently untrustworthy and should be ignored, his prejudice should have been disclosed at *voir dire*. If that prejudice had been disclosed, the foreman would have been challenged for cause. In the unlikely event that such a challenge would have been denied, the foreman would have been removed by peremptory challenge.

Thus, the instant case conflicts directly with *Bynum*, and is inconsistent with other decisions of the courts of appeals which recognize that a new trial is required when there has been concealment of material information or prejudice by a juror which could lead to a challenge for cause or a peremptory challenge. This Court should grant the petition to resolve the conflict.

2. The Decision Below Is Incompatible With Decisions Of This And Other Courts Which Permit Testimony Concerning Jury Deliberations For The Purpose Of Proving Concealment Of Prejudice On *Voir Dire*

The decision below is apparently based on the view that any post-verdict testimony by a juror concerning conduct during deliberations offered to establish concealment on *voir dire* constitutes impeachment of the verdict and therefore is barred by Rule 606(b) of the Federal Rules of Evidence. This view is incorrect and is incompatible with decisions recognizing the critical function of *voir dire* and permitting consideration of such evidence.

This Court has recently recognized that "[v]*oir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled . . . . Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges . . . ." *Rosales-Lopez v. United States*, —— U.S. ——, 101 S.Ct. 1629, 1634 (1981).

Inquiries on *voir dire* designed to probe for possible bias or prejudice justifying challenge for cause are essential since "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950).[3] Such inquiries are also essential to the exercise of peremptory challenges, "a necessary part of trial by jury," the denial or impairment of which is reversible error without a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Lewis v. United States*, 146 U.S. 370, 376 (1892).

The right to an adequate *voir dire* is meaningless without the right to corrective action in the event of concealment of material bias or prejudice. When a guilty verdict has been returned, the appropriate remedy is a new trial. It has been long established that concealment by a juror of a material bias constitutes juror misconduct vitiating the verdict. In holding that such concealment

[3] In view of the Court's recognition that trial judges possess discretion, in the absence of special circumstances, to refuse inquiry on *voir dire* concerning racial or religious prejudice (*Rosales-Lopez v. United States, supra; Ristaino v. Ross*, 424 U.S. 289 (1976)), general questions concerning bias or prejudice, such as the questions the trial judge asked in this case, constitute the only means in most cases by which the court and the attorneys can assess bias or prejudice.

is also punishable by contempt, Mr. Justice Cardozo, in this Court's unanimous decision in *Clark v. United States*, 289 U.S. 1, 11 (1933), stated:

> The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham.

In *Clark*, this Court held that the admission of testimony concerning the conduct of a juror during deliberations which revealed concealment on the *voir dire* violated neither the common law privilege against disclosure of the arguments and votes of jurors nor "the rule, which is not without exceptions, . . . that the testimony of a juror is not admissible for the impeachment of his verdict." *Id.* at 12-14, 18. The cases and commentators construing Rule 606(b), the modern codification of the rule against jurors' impeachment of their verdicts, reach the same conclusion. Judge Weinstein concludes that statements indicating "juror bias manifested in prejudiced comments during the deliberation . . . may be admissible not because they are not prohibited by Rule 606(b), but as tending to prove that the juror lied on the *voir dire*, a separate question from that of impeachment of verdicts." J. Weinstein & M. Berger, *3 Weinstein's Evidence*, ¶ 606[04] at 606-35 (1978). *Accord*, *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) (evidence from jury deliberations that the jury foreman concealed racial prejudice at *voir dire* admissible "to show that a juror should be disqualified by his prejudice and that the verdict in which he participated was a nullity."); *see Consolidated Gas & Equipment Co. v. Carver*, 257 F.2d 111, 115-16 (10th Cir. 1958); *Hyman v. Eames*, 41 F. 676 (C.C.D.Colo. 1890). The principal source of evidence of concealment on *voir dire* of a fact as subjective as racial

or religious prejudice is juror testimony concerning manifestation of the concealed bias during jury deliberations. In few other ways can it be shown that the prejudice was active during selection and service of the jury.

Pursuant to the approach of the court below, evidence that a juror concealed a material bias, such as religious or racial prejudice, at *voir dire*, and thus deprived a defendant of a fair trial, can not be considered on a motion for a new trial. Both fraud on the court and fundamental unfairness to the defendant are left uncorrected. Such a rule is so destructive of the purposes of *voir dire* and so significant a departure from the decisions of this Court and others that the Court should, in the exercise of its supervisory power, grant the petition to ensure that a proper standard is understood and applied in the lower courts. *See Rosales-Lopez v. United States, supra,* —— U.S. ——; 101 S. Ct. at 1635, 1636.

3. The Court Of Appeals Applied An Unacceptably Narrow Interpretation Of Rule 606(b) Of The Federal Rules Of Evidence On An Important And Unsettled Issue Which This Court Should Resolve

The jury foreman's pre-existing religious prejudice, brought to the jury room and communicated to, if not forced upon, Ms. Hendrix, requires a new trial irrespective of his conduct at *voir dire*. Testimony concerning manifestation of that prejudice during deliberations is encompassed by the plain language of the exception to Rule 606(b) which allows testimony concerning "extraneous prejudicial information." It was "extraneous"—the product of influences upon the jury foreman predating and unrelated to the trial.[4] It was "prejudicial" in both senses: it was harmful to the petitioner and the product of bias. Furthermore, it was revealed and promoted at a crucial

[4] The record contained no reference to the characteristics of Judaism, let alone the credibility of Jewish lawyers or their ability or willingness to "convince anybody of anything." (App. 21a) *Cf. Tobias v. Smith*, 468 F. Supp. 1287, 1289-90 (W.D.N.Y. 1979).

point in the jury deliberations, after the jury had reported itself deadlocked and had been given a modified *Allen* charge. Finally, although twisted, the jury foreman's view, both held and expressed, that a Jewish lawyer could not be trusted was "information".

The fact that the source of the "information" was the jury foreman himself, rather than someone outside the jury, is irrelevant, except that the power of the "information" to do harm was increased. Other courts of appeals have held—contrary to the decision below—that the "extraneous information" exception applies "regardless of whether the prejudicial extrinsic evidence before the jury comes from the lips of a bailiff or a juror." *United States v. Howard*, 506 F.2d 865, 868 (5th Cir. 1975); *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

In comparable circumstances, a variety of courts have rejected a narrow reading of the exception within Rule 606(b), or its equivalent in state law, and have held that post-trial evidence of bias or prejudice affecting the jury verdict justified a new trial.[5] The standard applied by the court below, moreover, is contrary to established principles regarding the appearance, as well as the fact, of

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[5] *See, e.g., Tobias v. Smith*, 468 F. Supp. 1287 (W.D.N.Y. 1979) (one juror told by another that she should take word of white victims as opposed to that of black defendant); *State v. Levitt*, 36 N.J. 266, 176 A.2d 465 (1961) (juror stated that most of the defendant's character witnesses "were Jews and even one of them was from the Synagogue"); *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933) (juror stated that he wouldn't believe a Sicilian under oath); *Commonwealth v. Thompson*, 328 Pa. 27, 195 A. 115 (1937) (remark by juror about "niggers" would require new trial; juror found not to have made remark as charged); *Scott v. State*, 171 Tex. Crim. 568, 352 S.W.2d 726, 727 (Tex. Crim. App. 1962) (juror stated that defendant "is a bad Negro and he has a bad reputation"); *Gilford v. State*, 49 Tex. Crim. 275, 92 S.W. 424 (Tex. Crim. App. 1906) (juror stated that defendant "was nothing but a damn negro, anyhow, and it would not hurt him to serve two years in the penitentiary if he was innocent").

religious or racial prejudice by a jury. This Court has long recognized that it would be "injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors . . . . No surer way could be devised to bring the processes of justice into disrepute." *Aldridge v. United States*, 283 U.S. 308, 315 (1931). Yet, the lower court's narrow reading of the exception within Rule 606(b) would totally insulate from review a verdict demonstrably contaminated by such prejudice and make the jury room a potential haven for bigotry.

This Court has not had occasion to address the scope of Rule 606(b) since the enactment of the Federal Rules of Evidence in 1975. The Court should grant the petition, in the exercise of its supervisory power, to establish definitive guidelines for the application of Rule 606(b) to testimony concerning statements by members of the jury during deliberations revealing racial and religious prejudice.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the substantial questions presented by the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-5101

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CLIFFORD Y. PIERCE,
Defendant-Appellant

ORDER

Before: LIVELY and BROWN, Circuit Judges; TAYLOR, District Judge.*

Clifford Pierce appeals his conviction for fourteen counts of possession and distribution of cocaine. Pierce, after a jury trial, was found guilty on all counts.

Pierce contends that the district court abused its discretion in not granting a new trial based on Pierce's charges of jury misconduct. Pierce bases his allegations of misconduct on post-trial testimony by a juror as to the following events: (1) several jurors indicated bias against Pierce because of his life-style; (2) one juror stated a belief that Pierce was involved in organized crime; and (3) the jury foreman made a slur, indicating racial and religious bias against Pierce's attorney. None of the foregoing information is alleged to have come from a source outside the trial. The juror who testified as to these events also testified that sarcastic comments were directed against her when she argued in favor of acquitting Pierce. She testified that she consented to a guilty

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* The Honorable Anna Diggs Taylor, United States District Judge for Eastern District of Michigan, sitting by designation.

verdict, in part, because she was not feeling well and because of uncomfortable conditions in the deliberating room. However, she does not allege physical coercion or threats by any jury member. Further, she does not allege that she complained of any illness or discomfort to any court official. Considering all statements made by the testifying juror as true, we find no abuse of discretion in the district court's denial of a new trial. It was not shown that "extraneous prejudicial information" within the meaning of Rule 606(b), Fed. Rules of Evidence, was brought to the attention of the jury. *United States v. Dye*, 508 F.2d 1226 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); *United States v. Jamison*, 493 F.2d 823 (6th Cir. 1974).

Pierce also alleges that the conduct of counsel for the prosecution during voir dire tainted the jury and that he was therefore entitled to a new trial. At voir dire, the prosecuting attorney read a list of potential witnesses and their occupations to the jury. One of the witnesses was a member of an organized crime strike force. Pierce contends that stating this potential witness' name and occupation improperly and prejudicially introduced the specter of organized crime to the trial. We find this contention without merit.

Pierce also contends that the district court erred in allowing a witness to testify, over objection, that Pierce had committed an act similar to the acts charged, but not charged in the indictment. However, another witness had already testified regarding this event without objection. This testimony was also used to rebut Pierce's testimony that he had never engaged in this type of activity. We therefore find that allowing this witness to testify was not reversible error.

Finally, Pierce contends that the conviction was improper for those counts where the prosecution could not produce the cocaine alleged as the basis of the offense.

However, we find there was sufficient circumstantial evidence produced that the substance was cocaine including testimony by a person, familiar with cocaine use, who tested and consumed the material. Other evidence supporting the conviction was the manner in which the material was hidden for shipment as well as the use of fictitious names and addresses on packages alleged to have contained the cocaine. *United States v. Cadena*, 585 F.2d 1252, 1264 (5th Cir. 1978); *United States v. Agueci*, 310 F.2d 817, 828 (2d Cir. 1962).

Upon examination of the record and consideration of the briefs and oral arguments of counsel, we find no error justifying a new trial.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-5101

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CLIFFORD Y. PIERCE,
Defendant-Appellant

ORDER

Before: LIVELY and BROWN, Circuit Judges; TAYLOR, District Judge.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing *en banc* in the above styled case; and

No Judge in active service on this court having moved for rehearing *en banc* and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing or in the supplemental memorandum which had not been carefully considered before issuance of the court's order;

Now, therefore, it is Ordered that the motion for rehearing be and the same is hereby denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

/s/ _____

Chief Deputy Clerk

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* The Honorable Anna Diggs Taylor, United States District Judge for Eastern District of Michigan, sitting by designation.

[LETTER TO COUNSEL FROM THE HONORABLE CHARLES M. ALLEN]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Louisville, Kentucky 40202

January 24, 1980

CHAMBERS OF
CHARLES M. ALLEN
CHIEF JUDGE

SPECIAL DELIVERY

Mr. Jack Blumenfeld
Mr. Joel Magazine
Ms. Ellen Leesfield
2699 South Bayshore Drive
Coconut Grove, Florida 33133

Mr. C. Fred Partin
Assistant United States Attorney
United States Courthouse
Louisville, Kentucky 40202

RE: United States v. Clifford Y. Pierce
Criminal Action No. 79-00090 L

Dear Counsel:

Several days after the jury returned a verdict of Guilty on all counts as to Mr. Pierce, I received a phone call from a woman juror who was unhappy about events that transpired during the deliberations of the jury, which, as you know, lasted for approximately two hours on Friday, January 11, 1980 and all day Monday, January 14, 1980, until late in the afternoon.

To be specific, the juror stated, in substance, that she had grave doubts about the guilt of the defendant, and

that members of the jury stated to her that she should not believe the arguments made by counsel for the defendant in light of the fact that he was of Jewish origin. Further, she stated to the Court that the jury discussed the question of the immorality of the defendant living with a woman while not married to her.

Although the Court polled the jury after its verdict, the Court is persuaded by the decision in the case of *United States v. Gerardi*, 586 F.2d 896 (1st Cir. 1978), that a meeting should be held with the juror and counsel for both the United States and the defendant in the chambers of the Court, to explore the questions raised by these statements made to the Court.

Since both the defendant and his counsel live in Florida, I believe it would be best to conduct the meeting with the juror on the same day as the sentencing is scheduled. Since the information which this Court has received could lead to the filing of a motion for a new trial by the defendant, that motion would then have to be resolved by the Court, and in the interest of judicial economy should be decided prior to any sentencing which might occur if the motion for a new trial should be overruled.

From a practical viewpoint, I would prefer to hear any motion for a new trial which may result from the disclosures of the juror on the same day that the meeting is held with the juror and counsel, and to decide that motion, and then if the motion for a new trial should be overruled, to go forward with sentencing on the same date.

The meeting with the juror should not take more than 45 minutes at the most in my estimation. The authorities which bear on any questions which might arise as a result of the meeting, at first glance, do not appear to be too numerous, and it would be my thinking that the

Court could probably resolve the questions raised within a relatively short period after the meeting has been had, and after counsel has been heard.

I will ask my Clerk to schedule the meeting with the juror at 11:30 a.m. on the same day that the sentencing is scheduled, unless this would cause an undue burden on counsel for defendant, in which event the meeting will be held at 1:30 p.m. and any potential sentencing held later in the day.

Please govern yourselves accordingly.

Sincerely yours,

/s/ Charles M. Allen
CHARLES M. ALLEN
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal No. 79-00090-01-L

UNITED STATES OF AMERICA,
Plaintiff

v.

CLIFFORD Y. PIERCE,
Defendant

TRANSCRIPT OF PROCEEDINGS

BEFORE HONORABLE CHARLES M. ALLEN, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, KENTUCKY, ON TUESDAY, JANUARY 29, 1980.

APPEARANCES:

For the Plaintiff:

Fred Partin
John L. Smith
Assistant United States Attorneys
211 U.S. Courthouse
Louisville, Kentucky 40202

For the Defendant:

Jack R. Blumenfeld
Joel R. Magazine
600B Office in the Grove
2699 South Bayshore Drive
Coconut Grove, Florida 33133

[1] THE CAPTIONED MATTER WAS HEARD IN CHAMBERS AT THE HOUR OF 11:00 A.M., ON TUESDAY, JANUARY 29, 1980. MR. PAUL S. BERGER WAS PRESENT WITH THE COURT AND COUNSEL, AND THE FOLLOWING PROCEEDINGS OCCURRED:

THE COURT: Good morning. How are things down in Miami?

MR. BLUMENFELD: Warmer.

MR. PARTIN: Good morning, Your Honor. Judge, could we have, could I have my law clerk present?

THE COURT: Oh sure, that would be fine. I just wanted to talk to you all a minute or two.

MR. PARTIN: This is Ken Kasacavage.

THE COURT: How are you, sir? This is Mr. Blumenfeld; in the middle, Mr. Magazine.

Gentlemen, I just wanted to orient you a little bit so that we would get our sights in focus here. I have done a lot of reading of the case law on interrogation of jurors after a verdict has occurred, and the cases look to be very strong. You really can't go into much with a juror as to matters that have occurred in the jury room, itself, about intimidation or racial overtone or that sort of thing; but I did want—I thought it was only fair to Mr. Blumenfeld and to the defendant to let you know that I had received this call from this juror and that I, before I looked at the cases, I wrote you all; and I [2] think we ought to call her in here and ask her questions which may be—which are strictly, probably incompetent under Rule 606(b) of the Federal Rules but which ought to be enough to put on the record to preserve the defendant's right, if they want to pursue the matter.

Further—or, you know, to make a record so that we know exactly what did happen . . .

MR. BLUMENFELD: I take it by the Court's remarks that you determined that this potential breach is not such as to . . .

THE COURT: I would think that.

MR. BLUMENFELD: I have some law.

THE COURT: We want to hear some arguments on it, but every case I have read—I've been looking at quite a few, and they all say that—the ones where there's been an improper conduct that they say should—I don't says there's a rule that always eliminates it, but—Mr. Blumenfeld, I'm not taking an arbitrary position on it. I'm just saying that all the cases I have read and the rule itself pertains to extraneous influence.

MR. BLUMENFELD: Yes sir. Judge, as I understand . . .

THE COURT: I do want to give you an opportunity to be heard on it, on the law; but—and ask her some questions, if you would like.

[3] MR. BLUMENFELD: I have no problem with the Court directing the initial part of the inquiry and . . .

THE COURT: Yeah.

MR. BLUMENFELD: I would only examine, quite frankly, if I felt there was something there to develop.

I do want to state though for the record we have some cases and argument, while the incompetency of a juror to impeach of a verdict is a general rule; and, of course, we're talking about 606(b), which is really nothing more than—but a codification of common law—the extraneous influence, exception to that, can come from another juror, and that has been held in cases we have cited and are prepared to cite.

THE COURT: You mean communication to a juror?

MR. BLUMENFELD: Yes sir.

THE COURT: To a juror from some outside influence?

MR. BLUMENFELD: Communication within the jury room from another juror, extraneous facts to other jurors.

THE COURT: I will be glad to look at the case.

MR. BLUMENFELD: *U.S. v. Howard*, a case which is at 506 F.2d, beginning at 865.

THE COURT: All right, sir. We'll take [4] a look at that.

MR. BLUMENFELD: As well as a case that is cited frequently throughout the case, *U.S. ex rel Owen v. McMann*, 435 F.2d 813.

THE COURT: Yeah, I want to look at that. I haven't had a chance to look at that.

MR. BLUMENFELD: And even, Your Honor, the case I anticipate the government will rely on, whether heavily or not, that being *Smith v. Brewer* . . .

THE COURT: Yeah, that was affirmed, incidentally.

MR. BLUMENFELD: Yes sir, that was affirmed without discussion.

THE COURT: Without real discussion. They said the Judge's opinion was without error as far as the law was concerned.

MR. BLUMENFELD: Yes sir, but the *Smith v. Brewer* decision, although it involved racial bias, I think lends support to the defendant in some of the other matters they have stated in that decision because of the way that the Judge in *Smith v. Brewer* treated the racial incidents; and those were all, of course, incidents of racial, really mischief or some attempt to be comical in *Smith v. Brewer*.

THE COURT: Yeah.

[5] MR. BLUMENFELD: But the Court in *Smith v. Brewer* was, I submit, was a strong case in favor of the government specifically leaves open an inquiry and a new trial, granting a new trial under circumstances such as I think is suggested by the Court's letter.

THE COURT: Yeah. I certainly—I would say this. You have a right to make that motion, and you have a right to make an inquiry as to this juror which we are going to do in chambers here; and whether we—whether technically her evidence would be non admissible or not, this is a chambers proceeding, so I am going to let it in here, and she's going to tell us what happened.

MR. BLUMENFELD: Prior to that, could I inquire of the Court, your letter was a summarization essentially of the conversation what specifically she said to you, or do you just intend to call her in?

THE COURT: I will be glad to ask her, but I'll tell you this much. We were giving a party for some people, two people, very small party, when this lady called; and she told me she was disturbed about the verdict. I said, tell me what disturbs you; and she said, well, there were references made to Mr. Pierce's living with another lady, something like that, evidence being that he might be living with this lady; and then she made the comment about your excellent argument and—she [6] didn't put it in those words, but I thought it was an excellent argument.

MR. BLUMENFELD: Thank you.

THE COURT: And said that one of the jurors told her that you couldn't put much stock in that because of your racial origin. That's the sum and substance, and that she was one, and the others were eleven; and they wanted her to go along with them, which I think is proper. I mean those cases say you can't impeach a jury verdict just because eleven persuaded one to go along with them.

So that is basically what she said, and I had to do some looking up to find out who she was. I couldn't remember her name because I didn't jot it down when she called me on the telephone; but we did find out who it was.

MR. BLUMENFELD: I think the most substantial factor there is the question concerning the discussion of my ethnic background and its influence because—and as distinguished, for instance, from influence on a juror when she's, you know, eleven versus one. I tend to agree with the Court that situations, most often situations come up where jurors go home and maybe read newspapers and see the defendant is sentenced and start having sec-

ond thought about it; and, therefore, they have a tendency to amplify the pressure.

THE COURT: That's true.

[7] MR. BLUMENFELD: The immorality, of course, was never argued; and that's, I think, a matter of extrinsicness; but more importantly, I think is the racial aspect of it, and I think the case law on the ethnic, which I think is odious as any racial bias, the *Smith v. Brewer* case itself addresses that issue and addresses it in context: and the Judge, in his extensive opinion in *Smith v. Brewer*, specifically found that the racial joking around there was brief, a brief distraction for the jury and that it was not discussed in the context of the factual developments.

Your Honor, if I might, at Page 490 of that opinion, the Court . . .

THE COURT: Yes?

MR. BLUMENFELD: . . . makes the finding the record does not reflect as petitioner argued that race was received or utilized by the jury in any evidentiary context.

THE COURT: We haven't heard yet from this lady what context.

MR. BLUMENFELD: In that case, there was somebody joking around, exaggerating, a minstrel or something like that because the defendant and his attorney were black; but—and specifically in that case, the one hold-out juror that complained of it testified that her verdict was based on listening to some evidence that was read back to her.

[8] This case, this specific decision was—I mean the influence was, don't listen to the defendant's attorney because of his ethnic background, which is a discussion in the context of the facts; and judging in the Howard case that we cited—did the Court receive that?

THE COURT: Yes, I have it here.

MR. BLUMENFELD: We have a motion for a new trial and then a supplement because the motion was essentially being typed when your letter came in.

THE COURT: Yes.

MR. BLUMENFELD: At Page 869 of that opinion of *U.S. v. Howard.*

THE COURT: I have it here.

MR. BLUMENFELD: Judge, beginning at Head Note 3.

THE COURT: All right, Paragraph 3.

MR. BLUMENFELD: They indicate in that aspect that the inquiry is as to objective facts but not as to subjective thought processes. In other words, I think that the rule is pretty clear that constitutionally in common law, you can't say to a juror, what influence did that remark have on your thought processes? You can't inquire into thought processes; and as it says at Page 869, though the Judge lacks even the insight of the psychiatrist, which I might question, must reach a judgment [9] concerning the subjective effect or objective effects without benefit of couched, interview, intraspections. In his determination, prejudice will be assumed in the form of rebuttable presumptions; and the burden is on the government to demonstrate the harmlessness of any breach to the defendant.

If there is a breach—up in that same column—the Court must determine whether there is a reasonable possibility a breach was prejudicial to the defendant; and as I said, the *Smith v. Brewer* case . . .

THE COURT: Of course, in Howard what happened, I guess, was this juror told the other jurors that the defendant had been in trouble two or three times, so that is extraneous information that he brought to the—true, he did it in the confines of the jury room, but he brought it to the attention of the jury and properly—I mean, it was improper, improper; and the Court—although the Court didn't go quite that far, they said, let's remand it

to the district judge to determine whether it, in fact, did prejudice that jury; but they said, as a rebuttable presumption, that did prejudice the jury; and I can understand; and that's a different situation, I think.

We want to hear this lady and see what she says, what happened, and then I will reserve judgment; but let's get her in here.

(The juror, Judith Ann Hendrix, comes [10] into chambers.)

THE COURT: Ms. Hendrix, come forward, please. If you will sit over here. I appreciate your coming down today. I hope we won't keep you too long, and I believe you know these gentlemen, at least by sight. The attorneys for Mr. Pierce and the attorneys for the government over here. I don't believe you met some of them, but I will dispense with the introductions now. You know Mr. Partin and Mr. Blumenfeld.

MS. HENDRIX: Yes.

THE COURT: Ms. Hendrix, we're here today to ask you certain questions about the—I'm going to ask you certain questions; and then if any other lawyers want to ask you any questions about your telephone call to me on Friday night, that it was, and that you would like to tell us about what happened in the jury room.

MS. HENDRIX: Uh huh.

THE COURT: I will ask you, of course, to be under oath, if you don't mind, so please hold up your hand.

JUDITH ANN HENDRIX, having been duly sworn, was questioned and testified as follows:

THE COURT: Ms. Hendrix, you were one of the jurors who, when you were polled by the Court on Monday, the date of conviction of Mr. Pierce, I asked each juror, you will recall, whether or not that was your individual verdict of Mr. [11] Pierce's guilt, and I believe you said he was guilty, is that correct?

A Yes.

Q And you called me four days after the verdict, did you not?

A Right.

Q All right. And will you tell us, at the time that you called me, you mentioned to me the fact that—is this correct, that one of the jurors or more than one referred to Mr. Blumenfeld's ethnic origins or that he was Jewish, is that correct?

A That's right.

Q And what else did they say with regard to Mr. Blumenfeld during the course of your deliberations?

A Well, one of the first things that was said when we went in there, one said, well, I know he's guilty. Another person said, well, he's lived with this woman before he married her; therefore, we know he's not morally straight. Another person said, he's divorced; and I don't approve of that, and I just couldn't believe, you know; and then I said, well—I wasn't saying I thought he was innocent or guilty. I said, well, I think the story is believable; let's go by the evidence. And another said, well, you know, that the defense attorney is Jewish; and you know how they can convince anybody of anything; and it [12] just really infuriated me. I just really couldn't . . .

Q Did this occur early or late during the deliberations?

A Well now, the first statement that I said, this was the first thing said; but then, about Mr. Blumenfeld, that was later on; but I can't remember all that was said.

At the end of it, they even had the defendant head of underground, you know, organized crime and everything; and I really, I didn't see anything like that brought out in it at all—I just, to me these people were so prejudiced that I don't know, I just couldn't believe. I was just shocked.

Q Well, let me ask you this now. Did the discussion concerning Mr. Blumenfeld—how long was that before

you decided to come to your verdict or join in the majority?

A You know, the thing that bothers me is I feel like my opinion is biased, too, because I was just so angered, so, you know, it bothered me because, you know, I don't know how I feel now because it just . . .

Q I see. All right.

A I really don't know. I wish I could say, but I really just—it really upset me.

Q Did the discussion about Mr. Pierce's alleged lack of morality in any way affect your verdict or thinking in the case? You didn't think it had anything to do [13] with the case?

A No.

Q Did you let the other jurors know that?

A Yes.

Q Now as I recall it, Ms. Hendrix, you all were out from about 7:15 or so on Friday until 9:15 or sometime, about two hours on Friday and then all day Monday until, what, 5:30, was it?

A Right.

Q Something like that. So I take it there was extensive discussion of the evidence in the case during those times, is that correct?

A Right. Well, actually, we didn't really get down to starting to look at the evidence. Everyone was just talking about what they remembered, and nobody could agree on what anybody remembered, you know; and just the last—they really started getting down to looking at the evidence by the—well, one person remembered this, something, and another person say, I don't remember that; and it was just trying to recall, you know.

Q I see. As I understood our telephone conversation, from your lack of mention, there was no physical force exerted on you.

A No. One person, well, they wanted to know how much I was paid, and . . .

[14] Q I see. You, of course, told them that you hadn't been paid anything, I take it?

A (Witness nods her head affirmatively.)

Q All right. Was there any discussion by any—well, was there more than one discussion of Mr. Blumenfeld's racial origin or just one?

A Just one, but, you know, that was—it was actually just one end of the table they were saying that; and they said, yeah, someone just sort of agreed, you know. One person actually made the statement.

Q And was this well before you decided to change—to join the majority; or was it right before?

A I would say it was sort of in the middle.

Q Somewhere in the middle?

A Yeah.

THE COURT: All right, gentlemen. I think I have asked enough. If any of you would like to.

MR. BLUMENFELD: Ms. Hendrix, was the statement about my origin after the jury had returned with the message that there was a deadlock, which I think was about 11:23 on Monday?

A It was after.

Q It was after that? Okay. And the statement about Mr.—the statement that I was Jewish. Did anybody [15] say how they knew?

A No. I guess, I assume it was your name.

Q Okay. But nobody said how they knew. There was one person said it, and the group around that person indicated agreement with the statement?

A Yes. It wasn't a group. It was . . .

THE COURT: I thought she said one or two.

MS. HENDRIX: Maybe. At least three, counting myself. I'm not sure who all.

MR. BLUMENFELD: And this statement about the head of organized—that he was head of organized crime, do you remember how that was introduced, that statement?

A Well, they went on to say it's strictly my opinion; and, of course, they were more than—it was more than one that got into it; but it was really—you know, I was saying that it was possible that he was just naive and really stupid; and they said, we don't think he's as dumb as they tried to make out like he was. In fact, we think he's the head of organized crime, and it was more than one person.

THE COURT: Did they cite any evidence at all, Ms. Hendrix?

A Well . . .

THE COURT: To back that up, or was that just an opinion-type thing?

[16] A Well, I think most of the people were not—I mean, they were intelligent people; but as far as formal education—well, I think they had in their mind that when a person has a degree, you don't make mistakes like that. They did indicate that, and I said, well—I, you know, I don't believe that at all; and this is why they thought he was trying to play dumb, and he was really . . .

THE COURT: I mean there were no references to any specific crimes or . . .

A No.

Q Or figure that he might have been associated with?

A No, in general.

MR. BLUMENFELD: Was that organized crime bit statement also after the message about being deadlocked, which was Monday morning?

A Right. I think it was after that. I'm sure it was.

Q And you said it was—I understand that it wasn't until Monday that there was any discussion of the evidence; or you said there wasn't really a discussion of the evidence, but people were talking about what they remembered?

A Different parts of it. (Witness nods her head affirmatively.)

[17] MR. BLUMENFELD: That's all.

THE COURT: Anybody? Mr. Partin?

MR. SMITH: If we could.

THE COURT: Certainly.

MR. SMITH: What exactly did the person say? What were the exact words that the person said in that reference to Mr. Blumenfeld's ethnic origin?

A Well, let's see. What led up to it was I was saying that I thought that his story was believable, that it was possible.

Q You say his. You mean the defendant's or . . .

A Mr. Pierce gave the story that—oh, he said that one of the reasons why he used an alias was because he was Jewish; and when he came to Louisville; and I said, that is believable because I remember instances ten years ago when someone, I was saying someone may have used . . .

THE COURT: I'm sorry, I didn't catch the part about Jewish. Would you go over that? Mr. Pierce, you said, said something.

MS. HENDRIX: Okay. One of his reasons for using an alias that I remember was that . . .

THE COURT: Mr. Pierce didn't use an alias. You mean Mr. Stein?

[18] MS. HENDRIX: Right, I'm sorry.

MR. BLUMENFELD: It was Mr. Pierce's testimony why Mr. Stein.

THE COURT: Yes, go ahead. Excuse me for interrupting.

MS. HENDRIX: He was saying one of the reasons that he used an alias was when he came to Louisville, or if I remember correctly, and what I was just trying to tell this man, I could see how he would believe that story because I did remember incidents up to ten years ago, if someone living out of town could believe it. I was just saying, it's possible, that's all; and then he said, well, and, too, you know, the attorney, the defense attorney is Jewish; therefore, you know, how they are. They

can convince anybody of anything, like he had convinced me. I don't really know that's what he meant, but I remember that because I felt that he meant it personally.

MR. SMITH: Do you know the identity of the jury who said that?

A Do I have to say?

Q No.

A Yes.

Q The question is . . .

A Yes, I do.

Q Do you know the identity of the juror who [19] said that?

A Yes.

Q Did just one juror say that?

A Yes.

Q What made you think that other jurors agreed with that?

A Because he—everyone seemed to agree with everything he said, most everything he said.

Q With what this one juror said, everybody agreed with him? I mean, how did they acknowledge their agreement? Did they say, yes, that's right, we agree? Did they nod their heads?

A Right, uh huh; or, I mean, you probably already know from what I'm saying, he was the foreman; and I think that he, you know, really was—seemed to be in control and the people seemed to agree with everything he said. This is what bothered me by being so hassled, like everybody just agreed.

Other people said things, too. Now he's not the one—he was very nice to me. He wasn't the one that wanted to know who paid me, or he wasn't the one who wanted to know if they had gotten my son and was holding him hostage or anything like that.

THE COURT: Somebody made remarks like that?

[20] MS. HENDRIX: Yes.

THE COURT: They did. Your son hasn't been held hostage, I take it.

MR. BLUMENFELD: What was that remark? They wanted to know who paid you?

MS. HENDRIX: Yes, and they wanted to know if they had my son hostage; and they said, you know, you can tell us. I really think they were really sincere, and they probably think they were right.

MR. BLUMENFELD: They sincerely believed your son was being held hostage, or you had been paid?

A I don't think they really believed that. I mean I guess they were really trying to figure out why I was so naive because one person said, well, it should be against the law for one naive person to be able to do this. The laws have to be changed because this isn't right and just . . .

MR. SMITH: Did you find yourself disagreeing with other jurors on just about everything? Did you find yourself . . .

A I can't—I think that my reactions were I was just so hurt, you know, that I just really—it was—I was really hurt, and I really started doubting myself. I thought, maybe I am naive; but at the same time, I felt this way, I felt they're wrong. They're wrong, too, you know.

[21] Q Did you find yourself in disagreement with the foreman on other areas or on other matters such as discussion of the evidence and the way in which you remembered the evidence as opposed to the way other jurors remembered the evidence?

A There was a lot of conflict. Well, this was with everyone. One would start talking about different times that Pierce came in. They couldn't remember this or that detail, and everybody got to talking; and they would remember, you know, certain things; certain things they couldn't; but the thing that they couldn't remember weren't important anyway, they thought, some minor details.

Q You didn't have any sort of personality conflict with the foreman or any of the others?

A No. He was very nice. One of the ladies was so mad at me that after she made the statements, she wouldn't even look at me. She would just . . .

Q Which statements were they?

A About me being naive and about—well, I don't know. She was so mad at me, she made them more than once actually, and so I really feel like I was so hurt that I really would hate to say any—I mean maybe I was saying he's innocent because I was hurt, I don't know. By having this type of people on the jury, it probably made me really feel sorry for the guy, you know. I honestly can't say now why I really refused to give [22] in and change my mind.

I also was very—I was sick, and I had a very bad cold, and I'm sensitive to cigarette smoke; and the room was very hot. Finally at the end, I kept telling how I felt; and he said, well, we are not going to give in. You are wrong. Judge Allen knows the man is guilty. We are not going to give in until you change your mind.

By that time, I thought I was going to pass out. I thought this was ridiculous. I knew I wasn't going to accomplish anything, and I thought—I really didn't know what to do.

Q Did you become physically ill?

A Yes, I was ill.

Q Were there people smoking there?

A The room then was very hot. I can't remember . . .

Q Did you ask the other people to cease smoking or not smoke?

A I don't usually do that because there was so many. I mean, I guess because I thought a lot of people get mad, and I just tend to try to endure it. I usually can go away. Really that didn't bother me as much as the fact the room was really quite warm, and I did have a bad cold.

Q But you nevertheless did vote, along with [23] the other jurors to find the defendant guilty, did you not?

A On the end, right.

Q When you were polled, you stated that that was your decision that he was guilty?

A Right. After he told me that we weren't going to leave until I changed my mind and everybody knew he was guilty and I was naive and . . .

Q Who told you that?

A They all agreed. Well, the foreman, he said that; and another lady named Irene, she was one of the ones that was really—just one person said that she did not like the way I was being treated, but she still agreed with them.

MR. BLUMENFELD: Did anybody indicate how they—the individual that said, well, Judge Allen knows he's guilty, did . . .

A Because I think they were saying, well, the evidence is here. We know—we all know he's guilty.

Q Somebody said Judge Allen knows he's guilty?

A Well, they said, someone was saying, you know, people who see this day after day, you know, we don't have any experience. They said, you know a person like Judge Allen is bound to know whether he's guilty or innocent; and we all know that he's guilty; and I said, but what if he isn't? And another [24] person said, I would rather take a chance on putting somebody up, and that really, just the statement. I said, even if he's innocent? He said, well, if I had my choice, yes.

I know what I'm saying is not very helpful, but it's so . . .

MR. SMITH: You found yourself—if I may, counselor?

MR. BLUMENFELD: Yes.

MR. SMITH: You found yourself then in pretty much disagreement with just about everything that was said?

A I think so. Well, when they started at the end, they did start looking at the evidence and saying, this was this; but it seemed to me that they wanted to find the evidence so bad, you know, that a couple of times they had them put together when it really wasn't; and when they started, you know, looking at the evidence more, but it was like—I don't know. By that time, I was too upset. I had heard so much I really, you know, I really was too upset to really even listen after that.

THE COURT: Anything further, Mr. Smith and Mr. Blumenfeld?

MR. BLUMENFELD: No.

THE COURT: Let me ask you one other thing. I want to get this clear in my mind. As I understand it, [25] this mention of Mafia connection was merely an expression of an opinion?

A Right. He did say . . .

Q He didn't say I have evidence?

A Right. He said, it's my opinion.

Q That Mr. Pierce was a member of the Mafia?

A He said because he was an educated man, and educated men could not be . . .

Q He may have been associated with the Mafia?

A Right. An educated man could not have carried on his affairs that carelessly. He had to be.

THE COURT: All right. Well, we certainly appreciate your coming here; and thank you very much.

MS. HENDRIX: I'm sorry I couldn't be more helpful.

THE COURT: That's all right. Thank you for coming.

(Ms. Hendrix leaves chambers.)

THE COURT: All right, gentlemen. You all want to discuss matters now, or what is the situation?

MR. BLUMENFELD: Well, of course, a few other things that were initially—that weren't in the letter, Your Honor, especially the fact of her physical illness

apparently [26] and sensitivity to smoke. Apparently what she said at the end, they told her she wasn't going to leave until she changed her mind. Of course, there were a lot of statements in there that I would concede under the common law and under 606(b), and let me back up.

606(b), I think the case is interpreted is more procedural than it is substantive. It never goes into, any cases that interpret 606(b) really don't go into what can impeach a verdict or what type of evidence is necessary to impeach a verdict; but more importantly, as to whether the jury is competent to do it, and I think that the policy of the law predating as well as postdating 606(b) is generally in favor of permitting the jury room the iron door, as I think one of the cases said, comes down and separates the jury from the outside world, which permits this jury process to be inviolate because of the precedential bases to invade the jury's province would do more harm than any particular individual case; but, and I find my quote in the *Smith v. Brewer* decision, Your Honor.

THE COURT: Yes sir. I'm glad to have you do it because it is a very well-written decision. You mean . . .

MR. BLUMENFELD: 444 F.Supp.

THE COURT: Right. Here it is.

MR. BLUMENFELD: Page 490 is the area that I [27] think is the most important discussion, beginning in the first full paragraph, first count; and in so saying, the Court does not suggest that in ruling jury incompetency embodied in Rule 606(b) should be applied dogmatically, and in complete disregard of what is alleged to have occurred in the jury room. Then there is a citation from the Supreme Court case of *McDonald v. Pless*, which indicates that the inviability of the jury room is less secure in criminal cases than civil cases for obvious reasons where, for example, an offer of proof showed that there was a substantial likelihood that a criminal

defendant was prejudiced by the influence of racial bias in the jury room. To ignore the evidence might very well prevent fundamental fairness.

In that particular case, *Smith v. Brewer*, the racial bias in the jury room was not in an evidentiary context.

Now, Your Honor, the Howard case, as we have cited in our motion for new trial, Second Circuit decision—excuse me, Fifth Circuit . . .

THE COURT: Lawyers' statements aren't evidentiary either, whatever statements you made as a lawyer are not evidence.

MR. BLUMENFELD: But it's in terms of an evidentiary context. What's happened is the ethnic bias has apparently deprived the defendant of his Sixth Amendment right to [28] counsel because they just basically said, you know, I guess the result the jury's verdict belies the statement made by the juror that we can convince—make any argument whatever, convince anybody of anything; but the fact of the matter is that clearly, through Howard, through *Owen v. McMann*, and through all the cases, even *Smith v. Brewer* discussion, there is not a dogmatic rule. There is an area of judicial discretion, and it speaks in terms of constitutional process.

The Howard decision specifically at 868 discusses this and the concept of a constitutional error, and the necessity that any evidence and that the decision come from the witness stand and public courtroom, for judicial protection of the defendant's right of confrontation, or cross-examination, and of counsel, citing the *Turner v. Louisiana*, 65 S.Ct. decision.

Now certainly had the bailiff or the marshal, somebody of that nature, communicated that fact to the jury and said to the jury, you know, don't believe the defense attorney, or, you know, you can't listen to anything the defense attorney said because he's Jewish; and they can

convince anybody of anything. No question, I think, of the decision.

THE COURT: That would be an outside influence.

MR. BLUMENFELD: That would be an outside influence; but the Howard decision at 868 goes on to say, these [29] principles are equally, whether prejudicial, extrinsic evidence comes before the jury, comes from the lips of a bailiff or a juror.

Now there certainly wasn't anything in the evidence about my religion, and my name is Germanic; but certainly my religious background wasn't in there.

The organized crime incident, while it was opinion, Your Honor, did come in; and, of course, we have cited that on the motion to strike the jury, motion for new trial when Mr. Roma Theus was introduced as a potential government witness.

THE COURT: Yes.

MR. BLUMENFELD: And testified and Mr. Partin identified him as a member of organized crime and the racketeering strike force out of Miami. So I think there's a psychological principle called primacy. They may have remembered it without realizing where they heard that evidence, that he was head of organized crime.

Of course, the aggression toward the juror's suggestion that her son was being held hostage and that she's being paid certainly wasn't being paid by the government since she was a hold-out; and interestingly, all of these events other than the talk of his morality occurred subsequent to the deadlock. The jury announced they were deadlocked, and the instruction to the jury by the Court. In *Smith v. Brewer*, they specifically left open this type situation, I would submit to the Court, and [30] that is that where the ethnic consideration in the jury really go to the fact determination or the ultimate issue determination; and there is no way I would concede that we could impanel any jury of any number in the United States that is totally sterile of any type of bias. It just

doesn't exist. I know that the Court and counsel, the Court's voir dire and examination, questions and all that attempted to do the best we can to eliminate people who are prejudiced and would be overt; and I know there's a catch-all phrase in the voir dire that the Court asked to leave the jury an opening as to whether there is anything that would deprive them of being a fair juror; and my name is Blumenfeld at the beginning of the case, and I was Jewish at the beginning of the case. We certainly had nothing from any juror saying, well, I don't think I would listen to the defense attorney.

Certainly I would submit, if the foreman of the jury said to this Court, well, I will disregard the arguments of Mr. Blumenfeld representing the defendant because he's Jewish, that there would be a challenge for cause; and I'm sure the government would probably . . .

THE COURT: I don't think he quite said that, to be fair to him, Mr. Blumenfeld. I think what he did say, the way I get the impact of her testimony in regard to him is here is a man, Jewish race, a race which is, I personally admire a great deal for their dedicated intelligence. They are an [31] intelligent race, a highly intelligent race. I think what he was saying to the jury was this should be considered by you. He was going further than that, I'll grant you. You're saying, maybe disregard his argument, or you know what his argument is because of his race. In other words, this is a highly clever, very able argument. I'm saying it was a very able argument, very well conducted; and that—but I think, I think it's very unfortunate that this has happened, but I don't think it's grounds for a new trial, but I certainly want you to preserve your argument to that ruling.

MR. BLUMENFELD: Your Honor . . .

THE COURT: And go on to the Sixth Circuit, something I think should be fully ironed out by them.

MR. BLUMENFELD: It could be ironed out just as easily if the Court granted a new trial, and the government would appeal it because, quite frankly, Your Honor, since I have received your letter, I have mulled over this, and I think the Court can—you know, I think that's obvious; and this particular case, I think the Court will concede, is not a case that any harmless error rule would apply to or where the evidence was overwhelming. It certainly was a close decision and . . .

THE COURT: Hinged on the credibility of Stein primarily.

MR. BLUMENFELD: Right. You know, we come in [32] with a request to hear the four witnesses whose testimony was not admitted as to guilt but only in the sense as to 404(b). Coupled with all this, coupled with the fact that at one point, they did come in believing themselves to be deadlocked, coupled with the fact that apparently the deadlock was broken by—not by the juror changing her mind. Smith—not *Smith v. Brewer*, one of the cases—well, I'm not sure, it may have been *Smith v. Brewer* or Eagle, one of them, the juror testified that her mind was changed when she had testimony read back to her that hadn't come out as she had anticipated. I think that was Smith . . .

THE COURT: Yeah, Smith and Brewer stands for the proposition you just cannot go back and say, a juror can't come back four days later and say, I renounce my verdict, especially after she's been asked by the Court; and I made it my responsibility to ask each juror whether this was their individual and considered verdict. I went further than just saying, is this your verdict; and I don't think that you ever come back after that and say—unless there's a physical, somebody was physically assaulted or that sort of thing, I'm sure the Court would have to set it aside.

MR. BLUMENFELD: Your Honor, her testimony was she was physically ill from the heat and from some

of the cigarette smoke, that she was sick and that she was told that she wasn't going to get out of there until she changed her mind.

[33] THE COURT: I don't recall that last. I do recall . . .

MR. BLUMENFELD: Yes. I can ask her to read that back. I recall her—because I recall in Mr. Smith's questioning as to the cigarette smoke and whether she asked anybody to put out the cigarettes; and she said she didn't do that because people get mad, but she was physically ill; and I think, in response to one of Mr. Smith's questions, if I'm not mistaken, she indicated she was physically ill, and there was a statement made to her . . .

MR. BERGER: They were not going to leave. They were not going to leave.

THE COURT: Well, the juror, it seems to me, and this is not law but just common sense, seems to me a juror has the responsibility to tell the Court if they are really ill and can't carry on their deliberations; and, in fact, I've had that happen in several cases. That's the reason why I told these alternates, if my memory is right, and I'm not sure my memory is right, but I think I told the alternates to remain under the oath not to discuss the case with anyone until it's been concluded so that if this lady had become ill, I would have called that alternate to have taken her place, if she'd told me that. I'm not denying she was ill. No doubt she was. I sympathize with her dislike for cigarettes. I share the same dislike, but . . .

[34] MR. BLUMENFELD: But I do recall her testimony, and she made some comment that they weren't going to leave until she changed her mind right after she testified she was physically ill. I think she said she had a cold, and the room was hot.

THE COURT: Yes.

MR. BLUMENFELD: She had a sensitivity to cigarettes, which I think is . . .

THE COURT: Well, I certainly appreciate your coming up here. I mean your interrogating and Mr. Smith's interrogating her. I think we've made a record so that your client will be protected.

MR. BLUMENFELD: We've also filed a motion for new trial as to other grounds.

THE COURT: Yes, I've read that. I want to read it again before 1:30, and we will come back at 1:30 then.

I think Mr.—this is a self-serving statement—I think Mr. Pierce had a very fair trial with possibly the only thing, the grounds I could see as far as outside this juror question would be the 404(b) question, and I think he frankly waived that because you made no objection. At any rate, I just don't think the motion for a new trial has much merit, but I will look at it again.

MR. BLUMENFELD: All right, sir.

[35] THE COURT: Thank you for coming.

END OF PROCEEDINGS

UNITED STATES CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF EVIDENCE, RULE 606(b):

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.